Labor and Employment Law Information Memo

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U.S. SUPREME COURT CONTINUES EXPANSION OF RETALIATION DOCTRINE

On May 27, 2008, the U.S. Supreme Court decided two retaliation cases which expose both private and public sector employers to additional employment retaliation claims and greater potential liability in such cases. In *CBOCS West, Inc. v. Humphries*, the Supreme Court held that 42 U.S.C. §1981 ("Section 1981") – a law which grants people of all races equal rights in the making and enforcement of contracts – encompasses retaliation claims, despite the fact that "retaliation" is not expressly addressed in the text of the statute. In the second decision, *Gómez-Pérez v. Potter*, the Supreme Court held that the federal-sector provision of the Age Discrimination in Employment Act ("ADEA") allows federal employees to file claims for retaliation in federal court based on age bias. This information memo summarizes the *CBOCS West, Inc.* and *Gómez-Pérez* decisions, the effect that these decisions are likely to have on employers, and the steps that employers can take to minimize the risk of liability for retaliation in light of these holdings.

CBOCS West, Inc. v. Humphries

The dispute in *CBOCS West, Inc.*, arose when a former African American employee alleged that his employment was terminated because of racial bias and because he complained to managers that a fellow African American employee had also been dismissed for race-based reasons. The employee brought suit under Title VII and under Section 1981. The Title VII claims had been dismissed on procedural grounds, leaving the employee's Section 1981 retaliation claim as his sole remaining cause of action. Before the Supreme Court, the employer argued that, while Title VII contains a provision which explicitly prohibits retaliation, Section 1981 contains no such provision, and that the text of Section 1981 which states "all persons within the jurisdiction of the United States shall have the same right in every state and Territory to make and enforce contracts. . . as is enjoyed by white citizens" was not intended to create an independent cause of action for retaliation.

The Supreme Court gave a broad interpretation to Section 1981 and did not limit its reading to the literal text of the statute. In holding that Section 1981 encompasses claims of retaliation, the Court relied heavily on its prior opinions interpreting statutes similar to Section 1981 (i.e., 42 U.S.C. §1982 and Title IX of the Education Amendments of 1972 to the Civil Rights Act of 1964) in which the Court held that protection from retaliation is sufficiently related to the enforcement of the express statutory right as to give rise to a separate cause of action.

While most labor and employment law practitioners were not surprised by the decision in *CBOCS West, Inc.,* the effect of that decision may prove costly for employers. Unlike Title VII, which has mandatory procedural requirements and enforcement provisions that balance competing interests, Section 1981 claims are much less regulated. For example, unlike Title VII, Section 1981 contains no limit on the amount of

compensatory and punitive damages that a court may award to an employee who has been subjected to retaliation in the workplace. In addition, while Title VII only applies to employers with fifteen or more employees, Section 1981 applies to all employers regardless of the number of employees. Under Section 1981, an employee is not required to exhaust administrative remedies with the Equal Employment Opportunity Commission ("EEOC") before pursuing a federal court action; a Section 1981 claim may be brought in court without any prior administrative review. Finally, Section 1981 has a four-year statute of limitations as compared to the 300-day administrative filing requirement under Title VII. The clear effect of *CBOCS West, Inc.* is to increase employers' exposure to race-based retaliation claims and liability.

Gómez-Pérez v. Potter

In *Gómez-Pérez*, the dispute arose when a United States Postal Service employee alleged that she was retaliated against for filing a complaint of age discrimination under the federal-sector provision of the ADEA. As originally enacted, the ADEA applied only to private employers. In 1974, Congress amended the statute to cover federal employees. Congress, however, did not include in this federal sector amendment a provision explicitly prohibiting retaliation. Thus, the Supreme Court was left to decide whether the broad prohibition against age discrimination in the ADEA's federal sector provision covers claims of retaliation. The Supreme Court, reversing the lower court, concluded that retaliation claims are covered.

In support of its decision, the Court relied heavily on several of its prior decisions holding that statutes similar to the ADEA, which contain broad anti-discrimination provisions, protect employees from retaliation, despite the fact that an express anti-retaliation provision was not included in the text of the statute. In delivering the Court's majority opinion, Justice Samuel A. Alito definitively stated that "retaliation for complaining about age discrimination is discrimination based on age."

The effect of the *Gómez-Pérez* decision is not as far-reaching as the Court's *CBOCS West, Inc.* decision since the ADEA provision at issue in *Gómez-Pérez* only applies to federal government employers. With respect to those employers, however, the Court's ruling allows employees, who previously were able only to bring ADEA retaliation claims to a federal Civil Service Commission, to bring those ADEA claims to federal court and to pursue the same remedies under the ADEA as are available to private sector employees, including money damages.

Minimizing The Risk Of Liability For Retaliation

There are a number of steps that employers can take to minimize the risk of liability for retaliation. Initially, employers should review their anti-discrimination and anti-harassment policies to ensure that they contain provisions strictly prohibiting any type of retaliation against an employee who files an internal or external complaint of harassment or discrimination, or who participates in any investigation. Employers should also conduct periodic training sessions to ensure that all employees are aware of their obligation not to retaliate against an employee who has filed a discrimination or harassment complaint. During an employer's investigation of an internal complaint of harassment or discrimination, the complainant, witnesses, the alleged harasser and relevant decision makers should be specifically advised that any type of retaliation will not be tolerated, and the complainant and any witnesses should be encouraged to make the employer aware of any conduct that might be retaliatory. In addition, if the employer's harassment or discrimination investigation results in disciplinary action against a supervisor or co-worker of the complainant, the supervisor or co-worker who has been disciplined should be specifically warned that any retaliatory conduct will lead to additional disciplinary action.

If you have any questions about the Supreme Court's rulings, or need any assistance in revising your employment policies or in providing training sessions to employees, please contact:

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